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September 15, 2004

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ELECTRONICALLY FILED

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: Improving Public Safety Communications, WT Docket No. 02-55

Dear Chairman Powell:

Verizon Wireless is deeply concerned by a recent report suggesting that Nextel Communications, Inc. (“Nextel”) and the FCC are engaged in post-decisional negotiations that involve material terms of the agency’s *800 MHz Order*.¹ Specifically, late last week, Legg Mason issued a report to investors stating that “Nextel is challenging . . . the Commission’s calculation of the value of the 800 MHz spectrum that Nextel is relinquishing as part of the spectrum swap” and the issues raised “could reduce Nextel’s payment to the Treasury by as much as \$600 to \$700 million.”² If accurate, the report is highly troubling, because Nextel has not made the required public disclosures of such discussions. Moreover, the relief Nextel apparently is requesting can only be pursued through a formal petition for reconsideration subject to APA notice and comment requirements – a proceeding in which all interested parties would have the right to participate. Moreover, as a substantive matter, the “correction” Nextel apparently seeks ignores other countervailing valuation issues.

If the Legg Mason Report is accurate, Nextel appears to be engaged in a post-decisional yet wholly non-transparent effort to significantly reduce its financial obligations to the U.S. Treasury. If such discussions have taken place, Nextel’s ex parte filings certainly do not put the public on notice that the company is seeking to increase the size of its windfall, at the expense of the American taxpayer, by some

¹ Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Report and Order*, FCC 04-168 (rel. Aug. 6, 2004) (“*800 MHz Order*”).

² Legg Mason, “Spectrum-Swap Proceeding Faces New Delays, But Nextel May Achieve Gains” (Sept. 9, 2004) (“Legg Mason Report”).

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\$600 to \$700 million.³ Nor has the public been afforded an opportunity to comment on or object to Nextel's post-decision efforts to amend one of the most basic elements in the *800 MHz Order* – the price Nextel must pay to the U.S. Treasury. There can be no serious question that a change with a \$600-\$700 million impact to the U.S. Treasury must be subject to open and public debate. It cannot and should not be shoe-horned into an *erratum*, which the Legg Mason Report suggests may be under consideration.

Assuming that Nextel is trying to reopen the basic valuation judgments of the *Order*, sound public policy demands that the FCC consider the myriad issues related to valuation together and not merely Nextel's claims – whatever they may be – in isolation. There are a host of other interrelated factors that would have to be examined in conjunction with Nextel's claims, including:

- **Valuation Methodology Distortions.** In structuring its valuations for the Interleaved and General Category channels, the FCC only considered Nextel's spectrum holdings in 11 of the top 15 markets.⁴ Obviously, the largest markets will require the most significant spectrum holdings and will therefore skew the results of any analysis. In looking at the FCC's data provided in its report to Congress in 2002, if the Commission had, instead of analyzing only the 11 markets that it did, chose San Jose, CA, Sacramento, CA, Hartford, CT, Birmingham, AL, Fresno, CA, Concord, CA, Knoxville, TN, Little Rock, AR, Pensacola, FL, and Lancaster, PA (all markets in the top 100), the calculations would have been radically

³ 47 C.F.R. §1.1206(b)(2). Nextel has filed only three notifications of ex parte contacts since the release of the *800 MHz Order*. See Letter from Regina M. Keeney, Lawler, Metzger & Milkman, LLC, counsel to Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 02-55 (filed Sept. 3, 2004); Letter from Regina M. Keeney, Lawler, Metzger & Milkman, LLC, counsel to Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 02-55 (filed Aug. 30, 2004); Letter from Regina M. Keeney, Lawler, Metzger & Milkman, LLC, counsel to Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 02-55 (filed Aug. 19, 2004).

⁴ See *800 MHz Order*, ¶ 319.

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different.⁵ Rather than showing that Nextel controlled, on average, 8.88 MHz of spectrum in the top 11 markets of the country, choosing these markets would have lowered this number to, on average, only 5 MHz of spectrum controlled in these bands. When this reduction in spectrum holdings is used as an input into the valuation formulas used by the Commission, the value of the 800 MHz Interleaved and General Category channels returned by Nextel would fall to between \$1.743 billion and \$1.989 billion, a significant decrease from the \$3.346 billion value applied by the Commission for these channels contributed by Nextel.⁶

- ***No Reduction for Border Areas.*** The Commission's coverage calculations actively avoid accounting for usage restrictions near the Canadian and Mexican borders. Under Section 90.619 of the Commission's rules, Specialized Mobile Radio deployment in the 800 MHz band is severely curtailed by agreements with foreign regulatory authorities throughout a buffer near the Canadian and Mexican borders.⁷ Based on Verizon Wireless's brief calculations, and graphically illustrated in Attachment A, 282 counties with a total 2000 Census population of 27.27 million (9.55% of the US pops) are entirely within the restricted border areas and 502 counties with a total 2000 Census population of 68.08 million (23.83% of the US pops) share some overlap, and are therefore affected by, the restricted border areas. Yet, the FCC has inexplicably avoided considering border area effects by artificially excluding Detroit, Seattle and San Diego from the markets it analyzes to determine how much spectrum Nextel holds on average.⁸ As such, if the Nextel arguments to consider adding more population coverage to the valuation calculations are adopted by the Commission,

⁵ See Letter from Michael K. Powell, Chairman, Federal Communications Commission to the Honorable W.J. (Billy) Tauzin, Chairman, Committee on Energy and Commerce, U. S. House of Representatives, Exhibits (dated July 26, 2002).

⁶ See 800 MHz Order, ¶¶ 320, 323. The \$3.345 billion value is calculated by adding the Commission's \$1.309 billion value for the Interleaved Channels to the Commission's \$2.037 billion value for the General Category Channels.

⁷ See 47 C.F.R. § 90.619.

⁸ See 800 MHz Order, ¶ 319 n.733.

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certainly an offsetting correction to take into account the effects of the border areas would be necessary as well.

- ***Less Than Nationwide Coverage.*** The coverage map from Nextel's own website, attached hereto as Attachment B, shows coverage that cannot be viewed as encompassing all 285 million U.S. pops. Indeed, the map appears to show no – or extremely limited – coverage in many states, including Montana, South Dakota, Maine, Wyoming, Nevada, Utah, Nebraska, New Mexico, Colorado and Idaho.
- ***No Recognition of Nextel Spectrum Gains.*** The *800 MHz Order* determines that, because operational restrictions will “effectively limit Nextel's use of half a megahertz of its ESMR spectrum after rebanding,”⁹ Nextel should not be credited with the gain of that 0.5 MHz. The fact that such spectrum remains licensed to Nextel, as opposed to being recovered by the FCC as a guard band, confers some benefit on Nextel that is completely ignored. Indeed, if Nextel's arguments concerning this “restricted” use are to be believed, the Commission should have also recaptured this spectrum for the guard band rather than supplying yet another credit for Nextel contributions.

Verizon Wireless urges the Commission to require Nextel to fully and fairly disclose the post-decisional arguments the company is making to the FCC. If the Legg Mason report is indeed accurate, the matters Nextel is raising must be subject to full and open notice and comment procedures, both as a matter of law and substance. If Nextel seeks such fundamental changes to the Commission's decision, Nextel must avail itself of the appropriate procedures and file a petition for reconsideration. The attempt to shoe-horn substantive – and fiscally substantial – changes to a Commission order in a post-decisional *erratum* is neither legally nor factually supportable.

Sincerely,

/s/ **R. Michael Senkowski**

R. Michael Senkowski
Counsel to Verizon Wireless

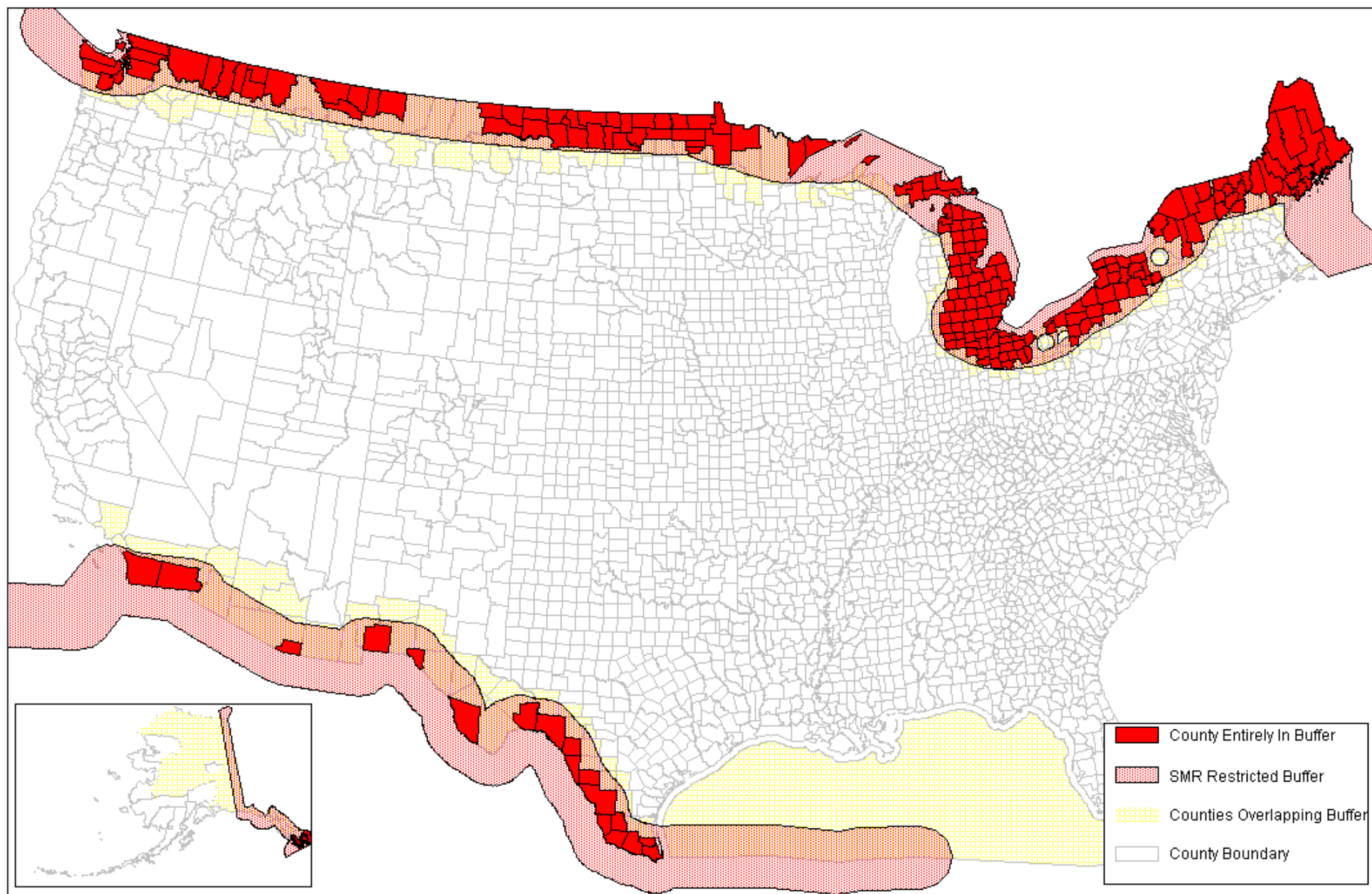
⁹ *Id.*, ¶ 316.

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cc: The Honorable Kathleen Q. Abernathy
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The Honorable Kevin J. Martin
The Honorable Jonathan S. Adelstein
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Attachment A: County and SMR Border Overlap Impact



ATTACHMENT B

